82-1407

Office-Supreme Court, U.S.
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JAN 14 1983
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October term, 1982

ALFRED F. NIGGLE and
BARBARA E. NIGGLE,

Petitioners,

v.

OLD KENT BANK AND
TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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QUESTION PRESENTED FOR REVIEW

Whether retroactive application of a Michigan Court of Appeals decision, reversing a prior Michigan Court of Appeals decision, and holding that the 1963 Michigan Constitution abrogated the defense of coverture, violated Article I, Section 10 of the United States Constitution, by expanding the liability of married women on surety contracts entered into in reliance upon the prior Michigan Court of Appeals interpretation of the 1963 Michigan Constitution.

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CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

The date of the Order of the Supreme Court of the State of Michigan sought to be reviewed is October 18, 1982, and the date of entry of the Order is October 18, 1982.

The statutory provision believed to confer on this Court jurisdiction to review the Order in question is 28 U.S.C. 127(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, First Paragraph of the Constitution of the United States:

> "No State shall enter into any Treaty Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill to Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." [Emphasis supplied.]

Michigan Constitution, 1963, Article 10, Section 1:

> "The disabilities of coverture as to property are abolished. The real and personal estate of every woman acquired before marriage and all real and personal property to which she may afterwards become entitled shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be dealt with and disposed of by her as if she were unmarried. Dower may be relinquished or conveyed as provided by law." [Emphasis supplied.]

CONCISE STATEMENT OF THE CASE

Prior to the enactment of the Michigan Constitution, 1963, Article 10, Section 1, there existed in Michigan a "defense of coverture", which provided that a married woman's separate estate would not be liable to pay a promissory note which the married woman co-signed for her husband, unless the consideration for the note passed directly to her separate estate. Koengeter v Holzbaugh, 332 Mich 280 (1952).

In City Finance Company v Kloostra, 47 Mich App 276 (1973), the Michigan Court of Appeals held that Michigan Constitution, 1963, Article 10, Section 1 did not abolish the "defense of coverture".

On January 7, 1980, Barbara E. Niggle co-signed a note with her husband, Alfred F. Niggle, promising to pay Old Kent Bank and Trust Company $12,000.00 plus in-

terest at a rate of 14.9%.

The Niggles failed to pay the note, and Old Kent Bank and Trust Company offset against an account of Barbara E. Niggle held in her maiden name, "B. Purcell" in the amount of $6,141.92, and sued for a balance of $6,074.21 in the 61st District Court of the State of Michigan. The Niggles sought by amended pleadings to assert as affirmative defense and counterclaim that the offset by Old Kent Bank and Trust Company against the account of "B. Purcell" was against Barbara E. Niggle's separate estate, contrary to the defense of coverture, and resulted in wrongful dishonor of checks drawn on that account. However, the district court granted summary judgment in favor of Old Kent Bank and Trust Company on July 10, 1980, without opinion.

The Niggles appealed the judgment entered in the 61st District Court to the Circuit Court for the County of Kent, State of Michigan on July 29, 1980.

Prior to the resolution of the Niggles' appeal to the Circuit Court, the Michigan Court of Appeals held that Michigan Constitution, 1963, Article 10, Section 1 did abolish the "defense of coverture" thereby reversing its decision previously made in City Finance Company v Kloostra, supra. Part of the reason for its reversal of City Finance Company v Kloostra, supra was as follows:

> "We believe this interpretation is sound for yet another reason. Constitutional provisions must be interpreted within the context of the times. * * * With the approval of the Equal Rights Amendment, and the passage of equal credit opportunity legislation, to mention only a couple of measures, Michigan has demonstrated its concern and support for laws treating men and women equally. In short, reviewed in the present day context, the constitutional provision is a reflection of our modern notions of equal rights for all persons, including those who choose to marry." [Citation omitted.] 103 Mich App at 435.

Michigan National Leasing Corp v Cardillo, 103 Mich App 427 (1981). By opinion entered June 5, 1981, the circuit court applied the decision in Michigan National Leasing Corp v Cardillo, supra retroactively, ruling that "Mrs. Niggle's bank account in her own name was not immune from taking by the plaintiff", and affirming the summary judgment entered in the 61st District Court. A judgment on appeal affirming the 61st District Court entered on September 18, 1981.

The Niggles applied for leave to appeal to the Michigan Court of Appeals, citing as one ground, inter alia, the following:

> "Assuming that Michigan National Leasing Corp v Cardillo, 103 Mich App 427 (1981) correctly states the law, there exists an issue as to whether the decision should be given prospective effect only. The effect of the holding that the defense of coverture is abolished, where the Court of Appeals had previously held that the defense of coverture was not abolished, is to re-write surety

> contracts entered into by married women upon reliance upon the prior existing law so as to increase their potential liability and to encumber their solely owned property, where previously, they had agreed to encumber their jointly owned property. The decision changes property rights relating to existing contracts based on prior law."

This was the first time in which the federal question of whether retroactive application of Michigan National Leasing Corp v Cardillo impaired the obligation of contracts. In their brief in support of application for leave to appeal, the Niggles further argued:

> "As a general rule, overruling of a decision is retroactive unless it would impair the obligation of contract or vested rights. See, e.g., Martin v White Pine Copper Co, 378 Mich 37, 44 (1966). Where there exists reliance interests upon a prior, established precedent, it is appropriate for the court to give the new ruling prospective effect only. See, e.g., Parker v Port Huron Hospital, 361 Mich 1, 28 (1960).
>
> In drafting and entering into

> suretyship contracts, the established law of the state provided that the married woman was encumbering only her sole and separate property. [sic: should read her joint property]. If Michigan National Leasing Corp v Cardillo is given retroactive effect, its effect will be to rewrite married women's surety contracts, expanding the collateral encumbered by married women by their suretyship contracts, without any additional consideration flowing to these women. Its effect upon commercial contracts in existence at the time that Michigan National Leasing Corp v Cardillo was decided is highly disruptive, and in essence gave to the financial institutions of the State of Michigan property for which they had not bargained and had not paid consideration for."

On January 4, 1982, the Michigan Court of Appeals denied the Niggles application for Leave to Appeal, "for lack of merit on the grounds presented".

The Niggles applied for leave to appeal to the Michigan Supreme Court, citing as one ground, inter alia, the same

ground above quoted in their Application for Leave to Appeal to the Michigan Court of Appeals, and arguing in their Breif in Support of Application for Leave to Appeal the same argument above quoted in their Brief in the Court of Appeals.

On October 18, 1982, the Michigan Supreme Court denied the Niggles Application for Leave to Appeal, "because the Court is not persuaded that the questions presented should be reviewed by this Court."

DIRECT AND CONCISE STATEMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

This Court has previously held that Article I, Section 10 of the United States Constitution protecting the obligation of contracts against state action, is directed only against impairment by legislation, not by judgment of courts. Thus, a reversal of a prior judicial interpretation of legislation does not generally violate the contracts clause. However, the Court has identified an exception to this general rule where:

> "The judgment of state supreme court seemed from its opinion merely to be a reversal of a previous construction by it of a statute upon the faith of which the contract had been made. In fact, however, the judgment merely gave effect to an existing subsequent statute impairing the obligation of the contract, which was thus a law passed in violation of article 1, §10."

Tidal Oil Co v Flanagan, 263 US 444, 453; 68

L Ed 382, 387; 44 S Ct 197, 199 (1924).

In the instant case, the courts of the State of Michigan, while purporting to re-interpret the Michigan Constitution, have in fact usurped the function of the Michigan legislature by "passing" an equal rights law by engrafting new meaning upon an old constitutional provision, based upon subsequent analogous legislation. The instant issue does not fall clearly within either the general rule, or the exception, described in Tidal Oil Co v Flanagan, supra. The Court should re-examine the contracts clause to determine its impact upon clear "judicial legislation".

STATE OF MICHIGAN	JUDGMENT	FILE NO.
61ST DISTRICT COURT		109728

Hall of Justice, 333 Monroe Avenue, Grand Rapids, MI 49503 456-3091

OLD KENT BANK AND TRUST COMPANY VS. ALFRED F. NIGGLE and BARBARA NIGGLE

Hunter M. Meriwether WARNER, NORCROSS & JUDD 900 Old Kent Building Grand Rapids, MI 49503 (Plaintiff Attorney)	JUDGMENT FOR: Old Kent Bank and Trust Co.
Kenneth T. Saukas 1110 McKay Tower Grand Rapids, MI 49503 (Defendant Attorney)	AGAINST: Alfred F. and Barbara E. Niggle

ORDER OF JUDGMENT

JUDGMENT DATE: JULY 10, 1980

Damages	$6,074.43
Interest	131.21
Costs	42.80
Judgment	$6,248.44

Other conditions, if any:

Execution to be limited to defendants' jointly-held property and the separate property of defendant Alfred F. Niggle. Defendants' counterclaim is dismissed with prejudice.

IT IS ORDERED that this Judgment is granted

/s/
DONALD R. STRATTON
Court Clerk

ENTRY, NOTICE OF JUDGMENT AND CERTIFICATE OF MAILING

This Judgment has been entered and will be final unless within 20 days of the Judgment date a motion for a new trial or an appeal is filed. Satisfaction of the Judgment may be made by payment to the Clerk of the entire amount of the Judgment, or by filing a satisfaction signed either by the party for whom Judgment was rendered or by the party's attorney.

I hereby certify that copies of this Judgment and notice were served upon the parties and/or their attorneys by ordinary mail.

7-10-80
Date of mailing

/s/
Deputy Court Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

OLD KENT BANK AND TRUST COMPANY, a Michigan Banking corporation,

Plaintiff-Appellee,

VS.

ALFRED F. NIGGLE and BARBARA E. NIGGLE,

Defendants-Appellants.

File No. 80-31174-AV

HON. Woodrow A. Yared, Circuit Judge

OPINION

Defendants have filed an appeal from summary judgment ordered in the 61st District Court. Defendants raise two basic issues at oral arguemnt. The first relates to the defense of coverture under the Married Women's Property Act. The second claims that a material issue of fact existed as to whether Mrs. Niggle's bank account in her own name was joint or separate property.

Defendants borrowed money from plain-

tiff. Defendants admit that the bank's loan was not paid and further admit that both husband and wife signed the note. The wife signed as surety. Defendants admit that the loan proceeds were obtained and used by them in the conduct of their jointly owned rental property (The Village Green Apartments) Their only income is from the apartment business.

The plaintiff bank upon default of defendants on the proimssory note took set off against the defendants accounts including the bank account in Mrs. Niggle's maiden name. The bank then sued for deficiency judgment for balance owed under the note.

The District Judge found that the wife's account was not separate property. The affidavits and evidence presented to the District Judge was sufficient to find that no genuine issue of material fact existed and that as a matter of law, plaintiff was entitled to summary judgment. This

Court cannot find that the District Judge errored in this finding.

However, the Court need not exhaust this issue for the reason of the ruling set forth in the recent case of Michigan National Leasing Corp. v. Cordillo 103 MA 427 (1981) In this case Mr. & Mrs. Cordillo were sued jointly and severally. The suit sought recovery of damages for breach of a lease of a cement mixer entered into by Cordillo Equipment Company, a Michigan Corporation, and breach of a personal guaranty executed by Mr. and Mrs. Cordillo. Mrs. Cordillo defended on grounds of coverture. The Appeals Court examined the Michigan Constitution 1963, Article 10 Sec. 1 which said that "The disabilities of coverture as to property are abolished." The Appeals Court held that the defense that no consideration inured to Mrs. Cordillo's separate estate was without merit. Mrs. Cordillo was found

to be jointly and severally liable on her guaranty contract.

The same reasoning must apply in this case. Mrs. Niggle's bank account in her own name was not immune from taking by the plaintiff.

The Court affirms the summary judgment entered in District Court.

DATED: June 5, 1981

/s/
HON WOODROW A. YARED
Circuit Judge

Examined, Counter-
signed & Entered

/s/
SUSAN ATKINSON
Deputy Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

OLD KENT BANK AND TRUST COMPANY, A Michigan banking corporation, Plaintiff-Appellee, v. ALFRED F. NIGGLE and BARBARA E. NIGGLE, Defendants-Appellants.	File No. 80-31174-AV JUDGMENT ON APPEAL

At a session of said court held in the Hall of Justice, Grand Rapids, Michigan, on September 18, 1981.

PRESENT: THE HONORABLE WOODROW A. YARED

The parties having filed their briefs in this appeal, and the court having heard oral argument and issued its Opinion, dated June 5, 1981, affirming the Judgment of the 61st District Court;

IT IS HEREBY ORDERED AND ADJUDGED, that the Judgment of the 61st District Court,

dated July 10, 1980, is affirmed, and that this case shall be remanded to the district court for further proceedings consistent herewith.

/s/
WOODROW A. YARED
Circuit Judge

APPROVED AS TO FORM:

/s/
Hunter M. Meriwether (P-25460)
Attorney for Plaintiff

/s/
Kenneth T. Saukas (P-28329)
Attorney for Defendants

ATTEST: A TRUE COPY

/s/
DONNA LUNFORD
Deputy

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 4th day of January in the year of our Lord one thousand nine hundred and eighty-two.

Present the Honorable
MICHAEL J. KELLY

Presiding Judge
WILLIAM R. BEASLEY
WALTER P. CYNAR

Judges

OLD KENT BANK AND TRUST COMPANY, a Michigan banking corporation,

Plaintiff-Appellee,

-vs-

ALFRED F. NIGGLE and BARBARA E. NIGGLE,

Defendant-Appellants.

No. 60667

L.C. # 80-31174-AV

In this cause an application for leave to appeal is filed by defendants-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 11th day of January in the year of our Lord one thousand nine hundred and eighty-two

/s/

RONALD L. DZIERBICKI
Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 18th day of October in the year of our Lord one thousand nine hundred and eighty two.

Present the Honorable

MARY S. COLEMAN
Chief Justice

THOMAS GILES KAVANAUGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.
Associate Justices

CR 36-401

OLD KENT BANK AND TRUST COMPANY, a Michigan Banking Corporation,

SC: 68716
COA: 60667
LC: 80-31174-AV

Plaintiff-Appellee,

v

ALFRED F. NIGGLE and BARBARA E. NIGGLE,

Defendants-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN--ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 18th day of October, in the year of our Lord one thousand nine hundred and eighty two.

/s/

JACQUELINE B. MOISE
Deputy Clerk

RELIEF

WHEREFORE, Petitioners pray that this Honorable Court grant their petition for writ of certiorari to the Supreme Court of the State of Michigan.

DATED: January 13, 1983

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82-1407

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

ALFRED F. NIGGLE and
BARBARA E. NIGGLE,

Petitioners,

v.

OLD KENT BANK AND TRUST COMPANY,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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ARGUMENT

I. THE PETITIONERS FAILED TO ASSERT THEIR CLAIMED FEDERAL RIGHT IN THE STATE COURTS.

The petition accurately states the facts of the case as far as it goes, but one omission is decisive. The petitioners' case was reviewed by Michigan courts at four levels, but never did the petitioners claim to be asserting any federal right. None of their state court pleadings or briefs refer to Article I, Section 10 of the United States Constitution, upon which they rely here, or any authority construing that provision. Instead, they relied only on Michigan cases interpreting Michigan law, which can hardly have framed the purported federal question for the state courts to consider.

This Court's decisions have settled beyond question the effect of such a failure. If the federal question is not duly asserted in the state court, it will not be

reviewed by the Supreme Court on appeal or writ of certiorari. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); 13 Moore's Federal Practice ¶ 510.01, pp. 8-56 to 8-64 (2d Ed. 1982). Moreover, the federal question must be substantial. Zucht v. King, 260 U.S. 174 (1922); Moore's, supra ¶ 512.01, pp. 8-73 to 8-79. Thus, with the federal question being presented to this Court for the first time, the petition should be denied.

II. THE PETITIONERS' FEDERAL CLAIM HAS NO MERIT.

The petition correctly states that the prohibition against legislative impairment of the contracts contained in Article I, Section 10 of the United States Constitution is not generally violated by the judicial interpretation of legislation. Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924); Mariniello v. Shell Oil Co., 511 F.2d 853, 859 (3d Cir. 1975). In this

case, the Michigan Court of Appeals' decision in Michigan National Leasing Corporation v. Cardillo, 103 Mich. App. 427, 302 N.W.2d 888 (1981), which is challenged by the petitioners, merely reversed an earlier construction of Article 10, Section 1 of the Michigan Constitution, which has been on the books unchanged since 1963. Since the petitioners did not execute their contract with the respondent until January 7, 1980, there was clearly no subsequent legislation to impair their contractual rights.

The petitioners try to invoke an exception based upon a judicial decision that gives effect to legislation enacted after a contract is formed. The exception does not apply in this case.

III. THERE IS ADEQUATE AND INDEPENDENT STATE GROUND FOR THE MICHIGAN COURTS' DECISION.

This Court has consistently declined

to review the judgments of state courts that rest on adequate and independent state grounds. As stated in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945):

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Here the state courts had no opportunity to "incorrectly adjudge federal rights", because the federal question was never presented to them. Even if it is assumed, however, that they would have decided the constitutional challenge erroneously, there was an independent basis for their decision, which did not involve any federal question. In fact, as described on pages 5 and 6 of the petition, the Michigan 61st District Court, which was the first state court to decide the case,

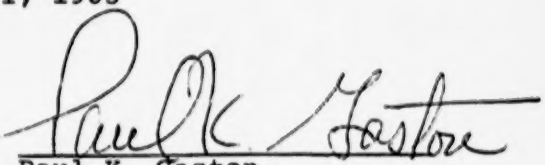
ruled against the petitioners without the benefit of the Cardillo decision. On the respondent's motion for summary judgment, the court ruled as a matter of law that the bank account against which the respondent set off was not her separate property, so that the defense of coverture did not apply in any event.

While it is true that, on appeal, the Kent County Circuit Court relied primarily on the Cardillo opinion, which had been rendered in the meantime, it did not reject the finding of the district court. Thus, this Court's ruling in favor of the petitioners on the merits would not be dispositive of the action, and the state courts on remand would be compelled to reconsider the original ground for the district court's decision.

CONCLUSION

Respondent asks the Court to deny the petition for writ of certiorari.

Dated: February 11, 1983



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